

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

EARL CAYADITTO and ETHEL MESCAL,
individually, and as natural and legal parents
of Ethan Cayaditto, deceased minor child, and
BRETT J. OLSEN, Esq., as the Personal
Representative of the ESTATE OF ETHAN
CAYADITTO, deceased minor child,

Plaintiffs,

vs.

No. CIV 04-1261 JC/LFG

THE UNITED STATES OF AMERICA,

Defendant.

**DEFENDANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

COMES NOW, Defendant United States of America, by and through its undersigned attorneys and proposes the following Findings of Fact and Conclusions of Law.

PROPOSED FINDINGS OF FACT

1. Ethan Cayaditto was born on 11/17/01 to 36 year old Ethel Mescal at Presbyterian Hospital in Albuquerque, New Mexico. Ms. Mescal was transferred to Albuquerque from Crownpoint Hospital to deliver her child. (Ex. 2, L23)
2. Ms. Mescal had eight pregnancies with seven living children, including Ethan. (Ex. 2, L23)
3. Ethan Cayaditto's estimated gestation was 30 weeks. He was premature. His Apgar scores were 7 at one minute and 8 at five minutes. (Ex. 2, L23)

4. Ethan Cayaditto was admitted to the newborn intensive care unit at Presbyterian Hospital because of his prematurity and respiratory distress. (Ex. 2, L23)

5. Ethan required supplemental oxygen therapy which was discontinued on November 29, 2001. He needed no additional supplemental oxygen through his transfer from Presbyterian Hospital on 12/14/01. (Ex. 2, L21)

6. Ethan was transferred to Gallup Indian Medical Center on 12/14/01 for feeding and growth. He weighed 1780 grams on 12/15/01. (Ex. 2, L25)

7. Ethan was discharged from Gallup Indian Medical Center on 12/28/01 weighing 2190 grams. (Ex. 2, L25)

8. He did not require any supplemental oxygen while at Gallup Indian Medical Center and had no periods of apnea (cessation of breathing). (Ex. 2, L24)

9. Ms. Mescal was given and passed a CPR course and car seat trial. (Ex. 2, L24)

10. Ethan was given his first Synagis injection on 12/28/01 at Gallup Indian Medical Center (Ex.2, L25). Synagis is a prophylactic medication designed to reduce the risk of a child to acquire RSV infection until later in life when it is less of a health issue. The American Academy of Pediatrics guideline is to provide Palivizumab (Synagis) for the first viral season for premature infants. (Testimony of Dr. Donald Kulas)

11. Ethan was examined on 1/8/02 at Pueblo Pintado Clinic with normal findings and given routine immunizations. His lungs were clear to auscultation (listening with a stethoscope). He was scheduled for a followup appointment on 1/14/02 (Ex. 2, L67)

12. The appointment for 1/14/02 was not kept and Ethan was reappointed for 1/24/02. (Ex. 2, L68)

13. Ethan was taken to the Crownpoint emergency room on 1/19/02 for “milk coming out of nose when eating.” Provider elicited from Ethan’s mother that the baby was “spitting up.” Child was observed for two hours and ate twice without problem. Normal examination. His lungs were clear to auscultation. (Ex. 2, L69)

14. Ethan was next seen at Pueblo Pintado Clinic on 1/31/02 for a well child check. Normal exam (Ex. 2, L71)

15. On 2/1/02, Ethan was seen at the Crownpoint clinic for a Synagis injection and for “trouble breathing yesterday.” Exam normal and Synagis given. Lungs had good air movement and were clear. (Ex. 2, L72)

16. Ethan was taken to the Crownpoint ER on 2/3/02 for fever of 99.6 to 100.3 degrees and a runny nose for two days. Exam showed moderate intracostal retractions. Aggressive nasal suction was performed and the case discussed with the on-call pediatrician, Tania Hurlbutt, M.D. He was discharged to home with a followup for the next day. His lungs were clear to auscultation with some upper respiratory sounds. His condition on discharge was good. (Ex. 2, L73; Testimony of Lisa Baumeister, M.D. depo. p. 53, 5-25; p. 54, 1-8; p. 68, 19-25; and p. 69, 1-3)

17. Ethan was not brought back for followup on 2/4/02. A Public Health Nurse contact was made on 2/5/02 from Gallup Indian Medical Center for a missed Synagis injection appointment. A “relative” at Ethan’s home advised that Ethan had gotten this injection at Crownpoint. (Ex. 2, L75)

18. The next visit in the medical record was to Pueblo Pintado Clinic on 2/7/03

for cough and congestion. Diagnosed and treated for rhinitis. Lungs were clear to auscultation with the exception of some upper respiratory sounds. Followup if needed. (Ex. 2, L76)

19. Ethan was seen on 2/14/02 at Pueblo Pintado Clinic for a followup of his URI. Lungs were clear to auscultation. Normal examination and followup scheduled for 3/14/02 and on 3/1/02 for his Synagis injection. (Ex. 2, L77)

20. Ethan received his Synagis injection on 3/1/02 at Crownpoint. (Ex. 2, L80)

21. Ethan was taken to Pueblo Pintado Clinic on 3/14/02 by his sister, Marina Sandoval. Sister reported that Ethan had a cough which started the day before and that he was pulling on his ear. Lungs were clear. Examination and treatment with followup scheduled for 4/15/02. (Ex. 2, L81)

22. Ethan received his Synagis injection on 4/1/02 and was scheduled for a well child check on 4/18/02. (Ex. 2, L83)

23. Ethan returned to the Pueblo Pintado Clinic on 4/16/02 with "coughing and wheezing" reported by mother. Lungs had good air movement anterior and posterior with occasional upper respiratory sounds that cleared with cough. Examination and treatment provided and directed to return on 5/2/02 or sooner if symptoms worsened or other concerns. (Ex. 2, L85)

24. Ethan returned to Pueblo Pintado Clinic on 4/18/02 with worsening symptoms which were diagnosed as Bronchiolitis and rhinitis. Lungs had occasional rhonchi in lower lung. Examination and treatment of Albuterol MDI with aerochamber given with instructions to his mother on use. (Ex. 2, L86)

25. Ethan was taken to his well child check on 4/23/02 at Crownpoint by his

mother. She reported that “he’s doing well” and she had no concerns. Normal examination. (Ex. 2, L87-88)

26. Ethan was taken to Cuba, New Mexico Health Care Clinic of Presbyterian Medical Services on 5/8/02 complaining of 1-2 weeks of “cold”. Lungs were clear with “NO” wheezing. Was given an injection of Bicillin and a one week followup. (Ex. 3)

27. Ethan was returned to the Crownpoint Clinic by his mother on 5/10/02 for a potential pertussis contact. Prophylactic antibiotic treatment was provided. (Ex. 2, L90)

28. Ethan returned to the Crownpoint Emergency Room on 5/11/02 with “cough for two months” per his mother. Exam was normal except for 100.1 temperature and congested lungs with few wheezes. Ethan was observed in the Emergency Room for about four hours and discharged home with a return check for the next day at noon. (Ex. 2, L91)

29. Ethan was brought back for the followup appointment on 5/12/02 to the Crownpoint ER and was admitted to Crownpoint Hospital. (Ex. 2, L92)

30. On 5/12/02, Ethan had Oxygen saturations below 90%, increased respiratory rate, inspiratory and expiratory wheezing. (Ex. 2, R42) He was admitted to the Crownpoint Hospital at 5 P.M. (Ex. 2, R48)

31. Ethan received supplemental oxygen while admitted until it was discontinued on 5/14/02. His oxygen saturation on room air at the time of discharge ranged from 91-93% at 10:15 A.M. on 5/14/02 (Ex. 2, R24)

32. Discharge diagnosis was bronchiolitis and hypoxia. (Ex. 2, R47)

33. Laboratory test for RSV on 5/13/02 was negative. (Ex. 2, L58)

34. Ethan returned for his followup and well child check to the Pueblo Pintado Clinic on 5/21/02. Mother reported that she had no concerns at that time. Normal examination. (Ex. 2, L94)

35. Ethan was next seen at the Pueblo Pintado Clinic on 7/2/02 for purposes of changing his reflux medicine per his mother's request. Medication was changed and followup appointment set for 7/16/02. (Ex. 2, L96)

36. The followup appointment for 7/16/02 was missed. (Ex. 2, L97)

37. Ethan was brought back to the Pueblo Pintado Clinic on 7/25/02 with a complaint of being "fussy" for one day. He was "alert and playful." Medications were refilled and a well child check was set for 9/17/02 and the child was to return sooner if symptoms worsened. Lungs were clear. (Ex. 2, L99)

38. On 8/2/02, Ethan's mother stopped at the Pueblo Pintado Clinic to pick up medications. (Ex. 2, L100)

39. Ethan was seen at the Crownpoint Emergency Room on 8/10/02 for an ear infection. Medication was given and followup set for Pueblo Pintado Clinic on 9/2/02. Lungs were clear to auscultation. (Ex. 2, L102)

40. Ethan was next seen on 9/17/02 for a well child check and mother voiced no concerns. Child was doing well. Normal examination. (Ex. 2, L103)

41. Ethan returned to the Pueblo Pintado Clinic on 9/23/02 with a fever, crying for most of the night, and tugging at ears. No cough, per mother. Medications given. Lungs clear to auscultation. (Ex. 2, L104)

42. Ethan returned to the Pueblo Pintado Clinic on 10/24/02 again pulling on his ears since yesterday, per mother. No cough per mother. Medications given and

followup for 12 month well child check set for 11/25/02. Lungs were clear. (Ex. 2, L105)

43. Ethan was brought to his well child check by his mother on 11/25/02. Mother reported that child had a fever that morning and was stuffy and had a runny nose. Normal physical examination and medications provided. (Ex. 2, L106)

44. Ethan returned to Crownpoint Emergency Room on 11/29/02 with vomiting and diarrhea for one day, per mother. Pulled both ears per mother and fever at home. Lungs were clear but both eardrums dull and dark red. Diagnosis of ear infection and referred to ENT. Antibiotic and other treatment ordered. (Ex. 2, L107-110)

45. Ethan returned to the Pueblo Pintado Clinic on 12/4/02 with a 105 degree temperature for one week. Referred to Crownpoint Emergency Room. Lungs had "few crackles" right base of lung. (Ex. 2, L116)

46. Ethan was admitted to Crownpoint Hospital at 3:50 P.M. on 12/4/02 for a febrile illness. His lungs were clear. (Ex. 2, R84)

47. Ethan's RSV test was positive. (Ex. 2, L58)

48. Ethan was discharged to his home on 12/6/02 at 11:45 A.M. (Ex. 2, R67)

49. This admission and discharge were appropriate. (Testimony of Plaintiffs' expert, Robert Henry, M.D.)

50. Ethan was seen at Pueblo Pintado Clinic on 12/10/02 for his followup appointment after discharge from the hospital. He was brought in by his mother and sister. They voiced no concerns. Lungs clear. Normal exam. (Ex. 2, L117)

51. Ethan was taken to the Crownpoint Emergency Room on 12/17/02 at 2:42 A.M., for crying without stopping. Per mother, he awoke at 10 P.M. on 10/16/02 and

was inconsolable since that time. He was admitted to the Hospital. (Ex. 2, L119)

52. Dr. Kulas admitted Ethan to rule out sepsis, pneumonia, meningitis and Kawasaki disease. (Ex. 2, R120)

53. Dr. Kulas ordered laboratory studies, including urinalysis and blood work. He ordered a lumbar puncture for analysis of the cerebral spinal fluid. He ordered a chest x-ray and an RSV test, which was positive. (Ex. 2, R135, R125)

54. Ethan remained on continuous oxygen saturation measurements throughout his hospitalization. (Ex. 2, R118)

55. Ethan was discharged to home on 12/19/02. Discharge diagnosis was bronchiolitis. (Ex. 2, R136)

56. He was given medications including a medihaler, spacer and face mask. Use of these medications were explained to Ethan's mother who verbalized her understanding. (Ex. 2, R113, R123, R124, R135)

57. Ethan's mother was instructed by Dr. Hurlbutt to return to the Emergency Room if "rash returns, symptoms worsen, or any breathing trouble or concern." (Ex. 2, R123)

58. Ethan's mother was instructed by Dr. Kulas to return to the clinic for "ANY" worsening or persistent symptoms, (esp. fever, irritability, rash, decreased oral intake, petechiae) or other concerns. (Ex. 2, R113)

59. Ethel Mescal, Ethan's mother was instructed by both Dr. Kulas and Dr. Hurlbutt to return to the Emergency Room if Ethan got worse. (Ethel Mescal Testimony)

60. Dr. Kulas also instructed Ethan's mother that he (Dr. Kulas) would be in the Emergency Room all that day and night and that she should come back with any

concerns. (Testimony of Dr. Kulas)

61. Ethan was taken to his father, Earl Cayaditto's house in Pueblo Pintado on 12/19/02 at approximately 7:00 or 7:30 P.M. Earl Cayaditto told Ethan's mother that she should take him back to the hospital because Ethan was getting worse. (Testimony of Earl Cayaditto)

62. Ethel Mescal, Marina Sandoval, and Ethan Cayaditto returned to the trailer at Whitehorse Lake on 12/19/02. That trailer was heated only by a wood stove. (Testimony of Plaintiff Ethel Mescal)

63. Ethan's condition worsened before morning on 12/20/02 and he was coughing and crying more continuously. Ethel Mescal left Whitehorse with Ethan before the other children were awake. (Ethel Mescal Testimony)

64. Ethan and his mother were at the Pueblo Pintado trailer next to the Pueblo Pintado School when Ethan got worse. Ethel Mescal put Ethan in the car and left for Whitehorse to get his sister, Marina. His breathing was bothering him. (Ethel Mescal Testimony).

65. Ethel Mescal picked up Marina Sandoval at their Whitehorse Lake trailer and started back to Pueblo Pintado. About half way to Pueblo Pintado, Ethan stopped breathing. (Testimony of Ethel Mescal and Marina Sandoval)

66. Ethan Cayaditto died prior to his arrival at the Pueblo Pintado Clinic on the morning of December 20, 2002. (Testimony of Plaintiffs' Expert, Robert Henry, M.D. and Naomi Martin, EMT)

67. The cause of death listed on the Certificate of Death was Acute bronchiolitis/bronchitis. (Death Certificate, Ex. 5)

68. Bronchiolitis is a common condition in infants and children under the age of two years, and occurs most often in winter months. Respiratory syncytial virus (RSV) is the most common cause of bronchiolitis. (Autopsy, Ex. 6).

69. Bronchiolitis is a “symptom complex” and the symptoms are treated in a supportive fashion as required. (Testimony of Defendant’s Expert, Gary Overturf, M.D.)

70. The care and treatment for Ethan Cayaditto for each of his admissions to the Crownpoint Hospital was appropriate and in keeping with the recognized standard of care. (Testimony of Defendant’s Experts)

71. The care and treatment for Ethan Cayaditto for each of his outpatient visits to the Crownpoint Hospital and Pueblo Pintado Clinic was appropriate and in keeping with the recognized standard of care. (Testimony of Defendant’s Experts)

PROPOSED CONCLUSIONS OF LAW

1. Venue is properly laid in this District.
2. The United States District Court, for the District of New Mexico has subject matter jurisdiction for this Complaint.
3. The substantive law governing this case is FTCA, 28 U.S.C. § 1346(b), 2671 et seq., and the applicable law of the State of New Mexico, including the Medical Malpractice Act § 41-5-1 et seq. NMSA 1978.
4. In accordance with the language of 28 U.S.C. § 1346(b) of the FTCA, the United States’ liability is to be determined by the application of the law of the place where the act or omission occurred.
5. At all times during the care and treatment of Ethan Cayaditto, the medical

personnel employed by Crownpoint Comprehensive Health Care Facility were under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical personnel practicing under similar circumstances giving due consideration to the locality involved. UJI 13-1101.

6. There was no deviation from the standard of care, nor were employees of the United States negligent each time when Ethan Cayaditto was seen and treated at Crownpoint whether in the Emergency Room, Clinic, inpatient ward or at Pueblo Pintado Clinic.

7. Every patient (in this case, the parent of the patient) has a duty to exercise ordinary care for his own health and safety. A patient (in this case, the parent of the patient) who fails to do so is negligent. UJI 13-1110.

8. Plaintiffs' own negligence prevented any opportunity of Defendant to treat the emergent condition of Ethan Cayaditto.

9. The elements required to establish negligence in a medical malpractice action are duty, breach, causation, and harm. Alberts v. Schultz, 975 P.2d 1279, 1283, 126 N.M. 807 (1999).

10. The Plaintiffs bear the burden of proving each of these elements.

11. The burden of proving reasonable medical probability rests with Plaintiffs to show that Defendant proximately caused the failure of Plaintiffs to return Ethan Cayaditto to the Crownpoint Emergency Room within the twenty four hours preceding his death. Plaintiffs have failed to demonstrate proximate cause in this case.

12. At all times relevant to the Complaint and at all times Ethan Cayaditto was evaluated and treated by the employees of Defendant, these employees did not breach

any duty to Ethan Cayaditto. At all times, they met the standard of care for all instances of evaluation and treatment of Ethan Cayaditto.

13. There can be no negligence on the part of Defendant as Plaintiffs made the decision to first delay and then to seek emergent medical care for Ethan Cayaditto at Pueblo Pintado Clinic at a time in which they knew that the Pueblo Pintado Clinic was not open.

14. Neither a hospital or its employees can guarantee a good medical result. The death of Ethan Cayaditto is not, in itself, evidence of any wrongdoing by Defendant. Instead, Plaintiffs must prove that the death was caused by Defendant's negligence. (UJI 13-1112) Plaintiffs have failed to prove that Defendant was negligent in this case.

15. Defendant United States of America is entitled to judgment in this action.

Respectfully submitted,

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/s/ (Filed electronically 01-18-06)
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I HEREBY CERTIFY that on January 18, 2006, a true and correct copy of the foregoing pleading was served by First Class Mail on the following counsel of record:

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